

BEFORE THE ADMINISTRATOR  
OF THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
AND THE SECRETARY  
OF THE UNITED STATES  
DEPARTMENT OF TRANSPORTATION

TRANSPORTATION SOLUTIONS DEFENSE )  
AND EDUCATION FUND )

Petitioners,

v.

BAY AREA AIR QUALITY MANAGEMENT  
DISTRICT, METROPOLITAN  
TRANSPORTATION COMMISSION,  
ASSOCIATION OF BAY AREA  
GOVERNMENTS, CALIFORNIA AIR  
RESOURCES BOARD

Respondents.

) TITLE VI COMPLAINT  
) [CIVIL RIGHTS ACT]  
) SEEKING ENVIRONMENTAL  
) PROTECTION AGENCY AND  
) DEPARTMENT OF TRANSPORTATION  
) INVESTIGATION AND REMEDIATION  
) OF DISPROPORTIONAL IMPACT TO  
) MINORITY AND DISADVANTAGED  
) COMMUNITIES FROM LOCAL AND  
) STATE AGENCY ADMINISTRATION OF  
) AIR POLLUTION CONTROL  
) PROGRAMS N THE BAY AREA  
)  
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Background

The Bay Area of California experiences unhealthful air quality, experiencing exceedences of the state and national ambient air quality standards for ozone. The area has experienced persistent violations of the federal one hour ozone national ambient air quality standard ("NAAQS") for 29 of the past 30 years since the one hour ozone standard was promulgated by EPA. The Bay Area has proven unable to develop an air pollution control plan sufficient to meet the federal ozone standard from its first designation as a non-attainment area in 1978 to the present (excepting the temporary and obviously erroneous EPA reclassification of the area to attainment in 1995). This problem is persistent and has simply not been properly addressed. *See, for example*, 62 Federal Register 66578, 12/19/1998,

1 redesignating the Bay Area back to non-attainment; and 66 Federal Register 17379 (3/20/2001), Notice  
2 of Proposed Rulemaking partially disapproving the Bay Area's 1999 SIP submittal and initiating  
3 sanctions, conformity lapse and federal implementation plan clocks (final action signed by Regional  
4 Administrator Laura Yoshii on August 28, 2001, Federal Register publication pending).

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6 The repeated failure of the local and state air pollution control authorities (the Bay Area Air  
7 Quality Management District, Metropolitan Transportation Commission, Association of Bay Area  
8 Governments and California Air Resources Board) to propose, adopt and implement adequate programs  
9 and regulations sufficient to bring healthful air quality in the Bay Area has exposed all residents and  
10 visitors of the region to unhealthful concentrations of ambient ozone. Additionally, the failure of these  
11 agencies to adequately control individual sources of air pollution, including indirect sources such as  
12 highways and transportation programs, has caused many communities that are located near to these  
13 sources to endure excessive exposure and suffer adverse health effects from this exposure.

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15 The Environmental Justice community has endeavored to work with these local agencies to halt  
16 and remediate the pattern of environmental racism that has accompanied the design and implementation  
17 of Bay Area air pollution control programs, without success or meaningful impact. We now call upon  
18 EPA and DOT to examine and investigate this issue, document the claims raised herein and which will  
19 arise upon EPA's and DOT's solicitation of additional information from affected communities, for EPA  
20 to withhold approval of any further SIP submittals and suspend funding the local air pollution control  
21 agencies under section 105 of the Clean Air Act until such time as these claims are investigated,  
22 documented, and remedial programs are adopted, and for DOT to withhold approval and transmittal of  
23 any further federal transportation funds under TEA-21 until such time as these claims are investigated,  
24 documented, and remedial programs are adopted. These remedial programs must address and resolve, at  
25 a minimum and in addition to any additional issues identified by EPA's and/or DOT's investigation, the  
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1 following issues: 1) the need for improved methods to encourage and actually consider public  
2 participation in air pollution control program development and implementation; 2) the effects that air  
3 pollution control programs have upon disadvantaged communities and communities of color; 3) the  
4 effects that individual and serial air pollution control measures (and rules resulting there from) have  
5 upon disadvantaged communities and communities of color; 4) the effects that individual and  
6 cumulative transportation control measures (TCMs) have had, and could have, on reducing the amount  
7 of vehicle-generated emissions of air pollution (including ozone precursors, toxics, diesel and particulate  
8 matter) from highways located in or adjacent to communities of color; 5) the disproportionate effect that  
9 failure to attain the federal one and eight hour national ambient air quality standards for ozone and the  
10 state one hour ozone ambient air quality standard has upon disadvantaged communities and  
11 communities of color as a result of particular susceptibilities common to members of those communities;  
12 6) inequities in access, frequency and quality of transportation services that disadvantaged communities  
13 and communities of color experience in comparison to other communities; and 7) the willful and  
14 deliberate actions by the Metropolitan Transportation Commission to evade, bypass and subvert an  
15 environmental justice and community involvement corrective action ordered as a result of the Federal  
16 MPO certification review, as expressed in the Final Planning Certification Report of 1999.

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18 This action is brought before both the U.S. Environmental Protection Agency and the U.S.  
19 Department of Transportation (DOT) because (1) one of the respondents, the Metropolitan  
20 Transportation Commission (MTC), is funded by the DOT while another, the Bay Area Air Quality  
21 Management District (District) is funded by EPA under § 105 of the Clean Air Act, 42 U.S.C. § 7405;  
22 and (2) the ozone plan and planning effort, which are the object of this complaint, is inextricably  
23 intertwined with the Regional Transportation Plan and associated process, for which the MTC is the lead  
24 regional agency in the Bay Area . The latter follows from the transportation conformity requirements of  
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1 the Clean Air Act (§ 176(c)) and from the ozone plan's substantial dependence on transportation-related  
2 sources of emissions. For instance, the 2001 Ozone Attainment Plan adopted by all three respondent  
3 agencies and considered by the California Air Resources Board notes that on-road motor vehicles  
4 contributed half of the emissions of ozone precursors in 2000 (Table 4, pages 10-11), and that the  
5 highest monitored values for ozone, which occur at Livermore, are "produced primarily from mobile  
6 source emissions" (ozone plan at page 20). There is no way the air quality and transportation planning  
7 processes can be disentangled, nor should they be.  
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#### 9 10 Applicable Legal Authority

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12 Environmental Justice has been recognized as a type of civil rights action enforceable under title  
13 VI of the Civil Rights Act. 40 U.S.C. § 2000d-1. *South Camden Citizens, infra*. Title VI provides "No  
14 person in the United States shall, on the ground of race, color, or national origin, be excluded from  
15 participation in, be denied the benefits of, or be subjected to discrimination under any program or  
16 activity receiving Federal financial assistance."  
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18 EPA adopted regulations at 40 C.F.R. Part 7 entitled Nondiscrimination in Programs Receiving  
19 Federal Assistance From the Environmental Protection Agency. "A recipient shall not use criteria or  
20 methods of operating its program which have the effect of subjecting individuals to discrimination  
21 because of their race, color national origin or sex, or have the effect of defeating or substantially  
22 impairing accomplishment of the objectives of the program with respect to individuals of a particular  
23 race, color, national origin or sex." (40 C.F.R. Part 7.35(b).) Analogous applicable DOT regulations are  
24 codified at 49 C.F.R Part 21.5.  
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26 President Clinton adopted Executive Order number 12898 on February 11, 1994 recognizing that  
27 inequities in the administration of federal agencies created cognizable environmental justice issues and  
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1 directing all federal agencies to "make achieving environmental justice part of its mission by identifying  
2 and addressing, as appropriate, disproportionately high and adverse human health or environmental  
3 effects of its programs, policies and activities on minority populations and low income populations in  
4 the United States". Section 2-2 of the Executive Order directs that "[e]ach federal agency shall conduct  
5 its programs, policies, and activities that substantially affect human health or the environment, in a  
6 manner that ensures that such programs, policies, and activities do not have the effect of excluding  
7 persons (including populations) the benefits of, or subjecting persons (including populations) to  
8 discrimination under such programs, policies, and activities, because of their race, color or national  
9 origin."

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12 The California Legislature adopted two environmental justice bills in recent years, SB 115  
13 (Solis) and SB 89 (Escutia). The final committee report to SB 115 drew specific attention to the role of  
14 air pollution in environmental justice disputes when it recited "a number of studies documenting that  
15 certain environmental hazards (i.e., **air pollution** [ . . . ]) are disproportionately located among minority  
16 and low-income populations." (Emphasis added)(Senate Rules Committee, Office of Senate Floor  
17 Analysis, SB 115, as amended 9/9/1999, page 3). Petitioner's hereto assert that the harm complained of  
18 here visits many disadvantaged communities throughout the Bay Area, in particular those that have  
19 higher percentages of minority and low income residents than the region as a whole. This includes, but  
20 is not limited to the communities of Oakland, Richmond, East Palo Alto, San Jose, Hayward,  
21 Emeryville, San Francisco, and each and every other city and community in the 9 county Bay Area.  
22 TRANSDEF's members and its Board of Directors are personally and directly affected by the  
23 discrimination alleged herein, as are millions of other individuals residing in and visiting the Bay Area.  
24 TRANSDEF asserts this complaint in a representative capacity on behalf of itself, its members and  
25 Board of Directors and all persons subjected to this discrimination in the Bay Area.  
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1           While a number of environmental justice cases have been filed, the most recent and germane to  
2 air pollution control claims is *South Camden Citizens In Action v. New Jersey Department Of*  
3 *Environmental Protection* (D.C. N.J., 2001), Civil Action No. 01-702, \_\_ F.Supp.2d \_\_\_, 2001 U.S.  
4 Dist. Lexis 4768, 52 ERC (BNA) 1523, and the supplemental opinion at 2001 U.S. Dist. LEXIS 5988;  
5 52 ERC (BNA) 1571, decided May 10, 2001. Actions have been filed in the Los Angeles region to  
6 address, *inter alia*, inequities in the allocation of federal transportation funding and the planning and  
7 implementation of Regional Transportation Plans and other planning processes in that region where  
8 transportation services utilized principally by transit-choice riders were prioritized to the detriment of  
9 transit services and programs which principally by transit-dependent communities. Labor/Community  
10 Strategy Center v. Los Angeles County Metropolitan Transportation Authority, 9<sup>th</sup> Circuit Court of  
11 Appeals, No. 99-56581, 2001 U.S. App. LEXIS 19410, August 31, 2001. Ongoing transportation equity  
12 and air quality environmental justice issues are active in the Atlanta Georgia area as well. See,  
13 generally, letter from Fred Krupp, Executive Director, Environmental Defense, to Secretary Rodney  
14 Slater, Department of Transportation, March 13, 1998, identifying a series of air quality and  
15 transportation equity issues of concern in many urban areas in the country.

16           A number of other federal agencies have promulgated environmental justice regulations, adopted  
17 procedures and guidance memos, and sought to ensure that their actions and the actions of any grantees  
18 comply with these civil rights requirements.

19           Petitioners contend that United States Environmental Protection Agency (EPA) and the United  
20 States Department of Transportation (DOT) have a duty under the prevailing authority to examine the  
21 claims asserted hereunder, perform an independent investigation of these assertions, and take all  
22 necessary and appropriate actions to remediate all significant disproportionate effects observed resulting  
23 from the administration of the federal agencies' programs and any disproportionate effects observed  
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1 resulting from the actions and inactions by the local and state air pollution control agencies in the Bay  
2 Area that are respondents of federal funding, including the BAAQMD, MTC, ABAG and CARB.

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4 **Allegations**

5 1. **The following recipient agencies have been comulicit in the allegations enumerated below:**

6 Bay Area Air Quality Management District (BAAQMD), Metropolitan Transportation Commission  
7 (MTC), Association of Bay Area Governments (ABAG) and the California Air Resources Board  
8 (CARB).

9 2. **The named respondents have used "criteria or methods of administering" their programs**  
10 **as described below to the effect that persons of color have been discriminated against by being**

11 **denied benefits and subjected to disproportionate burdens.** The violations have been manifested in  
12 the preparation and adoption of the 2001 Ozone Attainment Plan and antecedent plans, and in the refusal  
13 to prepare an environmental impact report for this Plan as required by the California Environmental  
14 Quality Act (CEQA)(Public Resources Code § 21,000, et seq.) These ongoing activities have been  
15 formally sanctioned by the respondents by their adoption of the Ozone Attainment Plan and a Negative  
16 Declaration under CEQA on July 18. These dates are within the 180 day time frame provided for in the  
17 applicable Title VI regulations, and therefore these actions and the actions culminating in them all fall  
18 within the purview of this complaint and the applicable regulations governing investigation of this  
19 complaint.  
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22 3. **State and Local Agencies Have Evaded Meaningful Air Pollution Control Plans** While the  
23 Bay Area was the first Air Pollution Control District created in the state of California in 1955, it will  
24 probably be the last to attain the federal one hour ozone standard. The District has been unable to model  
25 a demonstration of attainment of this standard since 1982, and even the 2001 plan admits that it is years  
26 away from having the technical resources and capabilities to do so. ("It is important to note that  
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1 complete data for estimating the emission reductions needed to attain the national 1-hour ozone standard  
2 are still not available . . . However, better tools (i.e. extensive field data and up-to-date photochemical  
3 modeling) will not be available for an attainment demonstration until at least 2003 when the results of  
4 the Central Coast Ozone Study (CCOS) are expected to be available"; Proposed Final Ozone Attainment  
5 Plan, June, 2001, pages 12-13.) The most recent proposed SIP submittal was developed in record time  
6 with no opportunities for meaningful public input. The District imposed an extremely abbreviated  
7 public comment period in its haste to "beat the clock" on a conformity freeze, and in so doing  
8 disproportionally trampled on the rights of those persons most affected by both ambient air pollution and  
9 the individual emissions from the vast majority of the sources of air pollution in the region. The  
10 District has gone to extraordinary lengths to adopt a Plan that has very limited substance and which  
11 relies almost exclusively on state measures for the vast majority (over 94 %) of the emissions reductions  
12 accomplished by this plan. Thus the latest failed Plan perpetuates and culminates the ongoing failure of  
13 the state and local agencies to provide for and achieve the air quality standards.

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17 **4. Low Income Communities and Communities of Color are Disproportionally Affected by**  
18 **Ambient Air Pollution and the failure Of the respondents to develop and adopt adequate air**

19 **quality plans.** Nonattainment areas in California, as is the case in many parts of the country, are  
20 comprised, relative to attainment areas, disproportionately of people of color. According to EPA, 52%  
21 of all Anglos live in ozone non-attainment areas while over 62% of African Americans and 71% of all  
22 Hispanics reside in these high health risk areas. Studies show that African Americans are 3 times more  
23 likely to die from asthma as Anglos. Asthma is 26% more prevalent in African American children than  
24 Anglo kids. Access to preventive health care by these communities is often less than in comparable  
25 Anglo communities, synergistic effects from other pollutants observed, occupational exposures are often  
26 greater in these populations and ambient environmental conditions are less healthful from elevated  
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1 levels of noise, less open space and recreational facilities, for example. These communities are typically  
2 disproportionately exposed to emissions from individual sources of air pollution including stationary  
3 sources and mobile sources. Therefore the delay in complying with the air quality standards, which is a  
4 direct result of the respondents ongoing faulty planning process, regarding which they have been  
5 repeatedly reminded by the public in testimony and in lawsuits since the late 1970s, has had a  
6 discriminatory effect .

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8 **5. Public Participation Opportunities Have Been Denied**

9 a. Failure of the Environmental Justice Work Group. While the District purportedly created  
10 a "work group" to examine environmental justice issues related to air pollution control, air quality and  
11 transportation planning issues, the processes identified and provided are instead designed to neutralize  
12 meaningful participation and serves only as "window dressing" for a defiantly racist and discriminatory  
13 program and process. The majority of established environmental justice and social change activists and  
14 representatives have declined to participate after the District refused to redesign the process to respond  
15 to the needs and interests of these communities. The District has witnessed mass public walkouts of  
16 public meetings. The District's environmental justice program is now under boycott by environmental  
17 justice activists and other community representatives.

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19 b. The public review process for the 2001 Bay Area Ozone Attainment Plan has been  
20 severely curtailed by the state and local agencies in order to meet a self-imposed deadline intended to  
21 avoid statutorily provided consequences for transportation conformity failures. This urgency is well  
22 documented in both the June, 2001 proposed Ozone Attainment Plan as well as the CARB Staff report  
23 accompanying the Plan, as well as in CARB's insistence that additional, but meaningless, public  
24 hearings be undertaken. The discriminatory effect of this self imposed criteria was thoroughly displayed  
25 and documented at the AQMD-MTC-ABAG adoption hearing on July 18, 2001 after these agencies  
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1 refused to extend the 24 day public comment period.<sup>1</sup> Investigators should consult the transcript and  
2 available videotapes of the hearing to capture the palpable apartheid imposed by the boards in this  
3 process. Among the data from just this one hearing:

4 i. While the community testifiers were comprised in significant proportion of African  
5 Americans and people of color, there were very few persons of color in attendance for the governing  
6 Boards. There was a verifiable sharp disparity in the proportion of people of color from the  
7 communities versus that of the governing Boards.

8 ii. The rank racism and condescension of the boards was evident in numerous incidents, not  
9 the least of which was BAAQMD Chairman Attaway's admonishment of Dr. Henry Clark, representing  
10 the highly reputed West Contra Costa Toxic Coalition, to "be respectful" in addressing the Board -  
11 before Dr. Clark had said a single word;

12 iii. The board's imposition of a 60 second time limit on testimony by community members  
13 effectively denied any form of substantive public involvement at the hearing;

14 iv. A grotesque result of the local agency adoption proceedings on July 18, 2001 was the  
15 admission by a number of board members that the public involvement process was indeed too short and  
16 inadequate, expressly acknowledged as part of the motion for approval of the Ozone Attainment Plan, to  
17 be followed by subsequent public involvement proceedings. Clearly this turned the purpose of public  
18 involvement on its head and make a travesty of the process. The subsequent public meeting process was  
19 so superficial as to glean very little additional meaningful public input.

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25 <sup>1</sup> The District released the draft Plan and opened the public comment period shortly before the close of EPA's  
26 comment period on the proposed disapproval of the 1999 Plan and proposed finding of failure to attain. Many of  
27 the participants that reviewed and commented on the draft District Plan were in the process of submitting  
28 comments on EPA's proposed rulemaking at the time that the draft Plan was released. Assuming that no  
commenters had the opportunity to begin review of the draft Plan until the EPA comments were submitted, and  
excluding weekends and holidays, the District provided the public a whopping 9 days to review and comment  
upon the draft Plan. A timely request for extension of the public comment period was summarily rejected.

1 c. The public record of testimony and comments on the draft 2001 Plan supports the  
2 contention that a substantial portion of the objections to the Plan have come from persons and  
3 communities of color. The extreme compression and foreshortening of the public involvement process  
4 systematically disenfranchises these persons and communities from their lawful right to participate in  
5 this planning effort.  
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7 **5. The State and Local Criteria for Meeting the Clean Air Act's Attainment**

8 **Demonstration Requirements Disproportionately Affect Persons of Color.** This is  
9 evidenced in several ways:  
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11 a. The selection of pollution controls for stationary, area and mobile sources has used  
12 methods and criteria that are discriminatory in effect. The public record shows that primary areas of  
13 contention between the state and local agencies and the communities are with regard to refineries and  
14 transportation. In both instances the state and local agencies have applied criteria for "reasonably  
15 available control measures" (RACM, § 172(c)(1), Clean Air Act) in ways which are not compelled by  
16 the Clean Air Act and which have resulted in the omission from the ozone plan control strategy of  
17 numerous reasonably available stationary source and transportation control strategies. In both instances  
18 the communities primarily affected by, and thus denied the benefit of, a more aggressive air quality  
19 control strategy are communities of color and low income. These same communities have made  
20 numerous suggestions of reasonably available measures, to have them rejected out of hand by the  
21 respondents on the basis of logically flimsy and clearly arbitrary rationales.  
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23 b. Transportation Planning Has Disproportionally Affected Targeted Disadvantaged and  
24 Communities of Color. Since inception, the Metropolitan Transportation Commission (MTC), co-lead  
25 agency with the BAAQMD in the development of air pollution control plans and the agency responsible  
26 for planning and implementing transportation infrastructure and services in the Bay Area, has  
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1 systematically discriminated against urban, low income, and ethnic communities and their  
2 neighborhoods. The disproportional effect is manifested in at least 3 ways. First, the targeted  
3 communities receive a substantially smaller portion of federal, state and local transportation funds than  
4 do more wealthy, Anglo, and suburban communities. Second, the targeted communities receive inferior  
5 public transit services than do other communities. This inferior service is measured in the frequency of  
6 service, the type and quality of service, and the scope of service. Finally, the targeted communities are  
7 routinely exposed to less healthful environmental conditions in their neighborhoods due to the proximity  
8 of highways and commercial transportation facilities that generate considerable amounts of air pollution  
9 in conjunction with stationary source air pollution noticed above. Together, these forms, sources, and  
10 amounts of air pollution combine to create communities with noticeably reduced quality of life, visibly  
11 degraded aesthetics, and less healthful living solely due to air pollution and transportation programs.

14 As with the District, MTC has undertaken an alleged environmental justice outreach program  
15 that is designed and managed for ineffectiveness. MTC has been the subject of at least two other Title  
16 VI environmental justice complaints, the response to which was obfuscation of issues and misstatement  
17 of relevant facts. MTC has been conditionally certified by the Federal Highway Administration due to  
18 problems with MTC's public outreach processes concerning disadvantaged and minority communities.  
19 MTC's opportunities for public participation have been managed in such a way as to discourage public  
20 engagement, and many potential participants have undertaken to boycott MTC's proceedings unless and  
21 until substantial changes are made. Currently, they are only window dressing and do not constitute  
22 legitimate processes.

25 The maldistribution of transportation benefits and burdens is reflected in numerous documents  
26 and proceedings. For instance, Table 7 of the ozone plan, "Bay Area Transit Trends since 1990" shows  
27 that the emphasis for transit investments has been almost solely investment in commuter transit serving  
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1 nonresidents of the core urban areas. Elsewhere such transportation policies have been characterized as  
2 "apartheid", and for good reason. Emphasis on peak hour commuter needs inherently disadvantages  
3 persons of low income, and available statistics would also show a similar effect with regard to race.  
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5 c. MTC has demonstrated its intent to frustrate the requirements of environmental justice  
6 and evade its responsibilities under the law.

7 i. MTC's response to the Federal Transit Administration regarding a previous  
8 environmental justice complaint was written in early January 2001, prior to the first meeting of  
9 MTC's Environmental Justice Advisory Group (EJAG), which had been tasked with fulfilling a  
10 corrective action ordered in the Final Planning Certification Report of 1999. The EJAG was to  
11 develop an environmental justice equity analysis methodology. Any knowledge of the existence  
12 of MTC's response was withheld from the EJAG. That response focused exclusively on tracking  
13 the money it distributed to transit operators. Had it been brought forward at that time, the  
14 response would have served as the obvious basis for the evaluation of equity. One must therefore  
15 conclude that MTC did not want the EJAG's discussion of equity to consider the allocation of  
16 transit funding.  
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18 ii. MTC's control over the EJAG process manipulated this process off in the  
19 direction of 'accessibility.' It was only as a result of constant pressure by TRANSDEF and other  
20 advocates that MTC finally agreed to include a financial analysis in the equity analysis of the  
21 RTP. It is therefore appropriate to conclude that, from the start, MTC wanted the EJAG to be a  
22 meaningless process, designed to distract participants away from what MTC considered  
23 important - the allocation of funding. It was an exercise in bad faith and an outrageous abuse of  
24 participants good faith willingness to engage with MTC.  
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1           iii.     The fact that the response was focused entirely on the money flows indicates that  
2 MTC senior management understands exactly what equity is about.

3           iv.     The fact that the response entirely failed to mention the \$1.755 billion dollars  
4 going to BART from AB 1107 sales tax funds indicates a clear intent to obfuscate, obscure and  
5 otherwise hide a conscious pattern of shortchanging AC Transit and MUNI while furthering the  
6 profligate expenditures of BART.

7           d.     Demonstrations and assessments of attainment have used methods and criteria that are  
8 discriminatory in effect. In rejecting the pollution controls referenced above, the respondents have  
9 relied in part on the argument that the Ozone Attainment Plan provides for attainment without additional  
10 controls. It is clear that, if the respondents admitted they had significant shortfalls in their reductions  
11 needed for attainment they would more aggressively pursue and adopt additional controls. In the plan  
12 the respondents have taken differing and contradictory positions on the adequacy of the attainment  
13 demonstration, arguing on the one hand that it is adequate, and on the other, as noted above (referring to  
14 page 20 of the plan) conceding that they are years away from having adequate data to determine how  
15 many reductions are truly needed. Given this ambiguous situation, they have opted to go for the  
16 minimum. This is all the more arbitrary and short-sighted given their own admission (again, in the plan,  
17 see page 33) that there are two subsequent ozone plans required under federal and state law during the  
18 next few years to meet even more stringent standards. As a result of these tactical and arbitrary  
19 decisions, the respondents have avoided numerous controls, among them the controls cited above and  
20 which would clearly provide much needed public health and environmental relief to low income and  
21 communities of color. This same theory may be applied to each technical and legal deficiency in the  
22 Ozone Attainment Plan, as these are developed in future comments to EPA's proposed action on the  
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1 Ozone Attainment Plan and its MVEB, conformity determinations; and in legal proceedings, such as the  
2 CEQA challenge. *infra*.

3 **7. Respondents have subverted CEQA, denying complainants the ability to have their suggested**  
4 **alternatives considered in the planning processes.**

5 The respondents have avoided their obligations under CEQA to provide an environmental impact  
6 report (EIR) on the Ozone Attainment Plan, instead filing a negative declaration, which was approved  
7 along with the Ozone Attainment Plan on July 18, 2001.<sup>2</sup> In doing so they have excluded low income  
8 and communities of color from every aspect of the proper EIR process, including the CEQA requirement  
9 for consideration of alternatives and their associated effects, including benefits and burdens. This is a  
10 very serious subversion of public involvement, and also of the decisionmaking process itself. Without  
11 an adequate decisionmaking process the result will predictably be the failure to consider and address  
12 disparate impacts.

13 In addition, MTC has consistently evaded the responsibilities of CEQA in the development of its  
14 Regional Transportation Plan (RTP). In response to the Notice of Preparation for the EIR for the 2001  
15 RTP, TRANSDEF submitted extensive comments focused especially on the absence of any viable  
16 alternative to the proposed project. As TRANSDEF predicted, the DEIR identified the System  
17 Management Alternative as environmentally superior, but went on to state that "this alternative is not yet  
18 ready for implementation." (DEIR, pg. 3-14) In other words, the DEIR identifies the cumulative  
19 regional impacts of a 19% population increase, a 33% increase in jobs, a 50% increase in Vehicle Miles  
20 Traveled (VMT) and a 152% increase in Vehicle Hours of Delay, without any exploration whatsoever as  
21 to practical means of mitigating these impacts.

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28 <sup>2</sup> TRANSDEF and Communities for a Better Environment have filed a legal action seeking judicial review of the negative declaration. CBE and TRANSDEF v. BAAQMD, et al., San Francisco County Superior Court, Civil No. 323849, filed August 16, 2001.

1 Contrary to the express purpose of CEQA decisionmakers receive no information as to the possibility of  
2 different outcomes. The draft 2001 RTP proposes funding for a multi-billion (the official estimate of  
3 \$3.8 billion is widely recognized to be several billion dollars short of the true cost) BART extension to  
4 San Jose, at a \$100 average cost per new rider, while declining to fund a program to provide  
5 comprehensive service for the transit-dependent population of the Bay Area. By facilitating a pattern of  
6 sprawl growth out into the far suburbs, MTC is proposing to deny equitable funding to low income and  
7 minority residents. who are typically Located in the region's more urbanized core. Had MTC actually  
8 considered the comments of the public, as they pertained to RTP projects and proposed TCMs,  
9 alternatives could have been studied that contained strong incentives to promote infill growth and  
10 transit-oriented development. TRANSDEF is confident that such alternatives would have demonstrated  
11 a significant reduction in cumulative impacts to the region, and would have provided equitable  
12 transportation funding and some level of remedial relief to low income and minority communities.

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15 **8. The Respondents Refuse to Consider Environmental Justice and Disparate Impacts.**

16 Federal Title VI regulations make clear that recipient agencies have an obligation to ensure that their  
17 programs have neither the intent nor the effect of excluding minority populations from the benefits of  
18 the respondents' programs. In sharp contrast to this requirement, the respondents state "[W]e would  
19 like to reiterate that the 2001 Plan is not a suitable forum for addressing concerns over environmental  
20 justice" (Staff Report by BAAQMD, MTC and ABAG, July 9, 2001, in response to comments at page  
21 12).  
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23 BAAQMD, MTC, ABAG and CARB have refused to even consider the effects of their policies,  
24 methods, criteria or the plan itself. However, the law and regulations are clear that, even if the criteria  
25 and methodologies are facially neutral, the respondents have an affirmative obligation to ensure that the  
26 effects, the results, are not exclusionary.  
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25



1        **Lest the quotation** from the 2001 Ozone Attainment Plan be **taken** as an **unfortunate instance** of  
2 **intemperance**, we **note** that the **BAAQMD** took a similar position in commenting **on EPA's** proposed  
3 **Title VI guidance** in June of 2000. The respondent agencies have demonstrated institutional resistance  
4 to the concept of environmental justice.

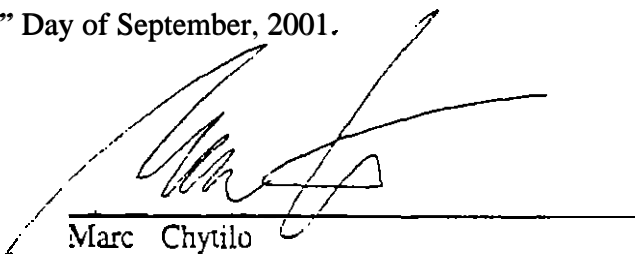
5        **We also note that** it would be quite practicable for the respondents to consider and protect **against**  
6 **discriminatory effects** in the planning process. **In** the current **air** planning effort, for instance, in  
7 selecting the **control** strategies it is quite feasible to identify the beneficiaries of the various candidate  
8 measures. **and therefore** to compare the measures and strategies in this regard. A somewhat analogous  
9 process is already underway in the RTP process by way of its "equity analysis" and the convening of an  
10 environmental justice advisory group to **advise** that effort. Without commenting on the adequacy of that  
11 **effort** (other than to **state** that it is not being properly implemented), it is plainly evident that a similar  
12 exercise could be incorporated **into the air** planning efforts. The plain fact of the matter is that the **air**  
13 planning project managers have elected not to perform such analyses. basically taking the position that  
14 such efforts are not required by the Clean Air Act. They thereby ignore, however, the mandate of the  
15 Civil Rights Act, and its inclusion in the mandate of the Clean Air Act in numerous requirements, for  
16 instance at § 110(a)(2)(E), which **incorporates** the prohibitions of other federal laws into the plan  
17 approval process. There is ample precedent. as the respondents are **aware**, for EP.4 refusing in other  
18 instances to proceed with approval of plan revisions in the presence of unresolved Civil Rights Act  
19 complaints. (see, **for example**, correspondence from U.S. EPA Region 9 Air Division Director David  
20 **Howekamp** to **CARB** Executive Officer Michael Kenny, December 23, 1997).

21        What is in evidence, **then**, is the willful, blatant and gratuitous **negligence** on the part of the recipient  
22 agencies in refusing, **quite** overtly and proudly, to consider the effects of their policies and **programs** on  
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1 **populations protected under** the Civil **rights Act and by** the 1994 Executive Order **on Environmental**  
2 Justice, **Such willful** contempt of the **law cries** Out for investigation. intervention and **corrective actions**.

3 Petitioners believe that practical **solutions** to **the** concerns **raised in** this complaint exist, **and seek the**  
4 support and **assistance** of the **federal** agencies in investigating **and remediating** the concerns raised  
5 herein. Petitioners intend **to** supplement this petition with additional **materials** in the **near** future.  
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8 **Respectfully submitted on this 7<sup>th</sup> Day of September, 2001.**

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11   
12 \_\_\_\_\_  
13 Marc Chytilo  
14 Attorney for TRANSDEF

15 CC:

16 U.S. Department of Transportation  
17 **Departmental Office of Civil Rights**  
18 External Policy & Program Development Division (S-33)  
19 Nassif Bldg., Room 5414  
20 400 7th Street, S.W.  
21 Washington, D.C. 20590

22 US Environmental Protection Agency  
23 Office of Civil Rights (1201A)  
24 1200 Pennsylvania Ave NW  
25 Washington, DC 20460

26 Coordination and **Review** Section  
27 Civil Rights Division  
28 U.S. Department of Justice  
Post Office Box 66560  
Washington D.C. 20035-6560